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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. NTSAKO MABASA, Defendant and Appellant.	B205360 (Los Angeles County Super. Ct. No. BA318882)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for the Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Ntsako Mabasa appeals from the judgment entered following his conviction by a jury on two counts of robbery with special findings that one of the robberies took place in an inhabited dwelling and in concert with two or more other persons. On appeal Mabasa contends his privately retained counsel was constitutionally ineffective because he had a disabling conflict that adversely affected his performance and the trial court committed reversible error when it denied his request on the third day of trial to discharge his retained counsel. We affirm.[1]

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Internet Pornography Partnership*

Mabasa, John Michael Fahed and Edward Anthony Collins were business partners for three years, producing and distributing pornographic movies on the internet. Mabasa produced and directed the movies and maintained certain business records, including releases from the actors and other documentation required for adult-related video material. Collins set up and administered the websites used to sell the partnership's product. Fahed handled billings for the adult websites and managed the partnership's finances. The partnership was terminated effective January 1, 2007 after Mabasa failed to respond adequately to Collins's and Fahed's concerns about certain discrepancies and omissions in the records for which he was responsible.

2. *The March 2, 2007 Robbery*

Initially, Mabasa retained the master tapes for the partnership's movie inventory and the related business records. Fahed arranged a meeting with Mabasa at his home on the evening of March 2, 2007 to review the partnership materials still in Mabasa's possession and to buy out his interest in them. (Mabasa had told Fahed he needed money.)

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[1] In a separate order we deny Mabasa's petition for writ of habeas corpus (*In re Mabasa*, B212884), which repeats his claim of ineffective assistance of counsel based on trial counsel's purported conflict of interest and seeks to support that claim with materials not in the record on appeal.

Mabasa arrived at Fahed's home at 6:30 p.m. He entered the house with a large plastic container, which Fahed believed held the tapes and records. Fahed took Mabasa to his office, where Mabasa set the container down. Mabasa asked for a receipt for the items he was leaving. Fahed sat at his desk to prepare the receipt. Before he finished, someone approached him from behind, grabbed him and pushed him over. He fell, hitting his head and knocking over some computer equipment. The assailant starting hitting Fahed and said, "You should have paid my boy." Fahed did not recognize the man's voice. Another man entered the office at this point and told Fahed they were not going to hurt him, although the initial fall or the blows had caused Fahed's forehead to bleed. Fahed did not recognize this man's voice either, but could distinguish between the two unknown intruders.

One or both of the intruders then took Fahed by the arms and forced him down the hallway to a back bedroom. The men told Fahed not to look at them; and he complied, staring only at the floor. The initial assailant told Fahed at some point he had a gun. Although Fahed felt something hard pressed against the side of his head, he did not look and could not confirm it was a firearm.

Once in the back bedroom, Fahed was once again punched several times and thrown to the floor. The assailants placed a pillowcase over Fahed's head and tied his hands behind his back. Fahed did not know if Mabasa was in the bedroom. Nonetheless, Fahed advised the men other people knew Mabasa was coming to meet with him that evening; in response they told him to shut up. The men asked Fahed where he kept his cash, and he could hear them opening drawers and pulling items out. Fahed replied that Mabasa knew he did not keep cash in the house.

While still bound and with his head covered, Fahed was seated on the bed. Mabasa came into the bedroom and sat next to him. He asked Fahed where he kept his car keys. (Fahed recognized his former partner's voice.) Fahed told him. Mabasa left the bedroom and returned a short while later, explaining to Fahed they planned to take him somewhere in his own car. Mabasa also inquired whether Fahed expected anyone at

the house. Fahed responded that Ira Davis, his domestic partner, would be coming home and reminded Mabasa he had met Davis on several occasions. Following a discussion among the two intruders and Mabasa, one of the unknown men took Fahed from the bedroom to a bathroom, where he forced him to kneel with his head down.

Davis arrived at Fahed's home around 7:30 p.m. and noticed an unfamiliar truck or sports utility vehicle parked in the driveway. Davis stopped his car in front of the house and attempted to call Fahed on his cellular telephone. Before the call was completed, Mabasa approached the passenger side of Davis's car. Davis, who recognized Mabasa as a business associate of Fahed's, opened the passenger side door. Mabasa reached in, grabbed Davis's telephone and moved away from the car. Davis got out of his car and pursued Mabasa. Mabasa punched Davis, and the two men then struggled with each other.

As Davis and Mabasa were fighting, Craig Fleishman, a neighbor of Fahed's, saw them. Davis yelled to Fleishman to call the police. Fleishman immediately called the police emergency number. Davis, who was concerned about what might have happened inside the house, let Mabasa go. Fleishman, who could not identify Mabasa, saw the man who had been struggling with Davis get into the vehicle parked in Fahed's driveway and leave the area.

Davis went inside the house and found Fahed, bruised and bleeding, coming out of the shower area in the bathroom. The two men waited for the police to arrive. Fahed reported his car keys, wallet and a silver chain and bracelet had been stolen. He later determined a digital video camera and two MP3 players were also missing from the house.

3. *The Charges*

In an amended information Mabasa was charged with one count of home invasion robbery (of Fahed) and one count of second degree robbery (of Davis), both in violation of Penal Code section 211. The information specially alleged the home invasion robbery

had been committed by Mabasa in concert with at least two others. (Pen. Code, § 213, subd. (a)(1)(A).) Mabasa pleaded not guilty and denied the special allegations.

4. *Mabasa's Representation by Private Counsel Retained by Collins*

At the preliminary hearing on March 29, 2007 Kenneth Markman, Mabasa's private counsel, disclosed he had been retained to represent Mabasa by Collins, Fahed's current and Mabasa's former business partner. In cross-examination by Markman at that hearing, Fahed acknowledged he had informed Collins he felt "it was wildly inappropriate for him to be involved in the situation at all," and cautioned Collins he would reconsider their business relationship if he continued to finance Mabasa's defense. Immediately before the start of trial, Markman again informed the court that Fahed had threatened to terminate his on-going business relationship with Collins if Collins continued to pay for Mabasa's defense attorney. As a result, Collins stopped paying Markman, and Markman represented Mabasa through trial without additional compensation.[2] (Mabasa refused the court's invitation to appoint Markman as his counsel at public expense pursuant to *Harris v. Superior Court* (1977) 19 Cal.3d 786.)

5. *Trial, Verdict and Sentencing*

Fahed, Davis and Fleishman testified at trial and described the March 2, 2007 robberies. Mabasa did not testify or present any evidence in his own defense other than through cross-examination of the People's witnesses.

The jury convicted Mabasa on both robbery counts and found true the special allegation the robbery of Fahed took place in an inhabited dwelling and in concert with two or more other persons. Mabasa was sentenced to an aggregate state prison term of four years: three years (the lower term) for the first degree, home-invasion-robbery-in-

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[2] In a declaration filed in support of Mabasa's petition for writ of habeas corpus, Collins explained he had entered into an oral fee agreement with Markman to pay him $5,000 for all pretrial work in three installments and another $5,000 if the case went to trial. After Fahed threatened to terminate his business relationship with Collins, Collins told Markman he would complete payment of the initial $5,000 but would not make any additional payments.

concert of Fahed and a consecutive term of one year (one third the middle term) for the separate, second degree robbery of Davis.

DISCUSSION

1. *Defense Counsel's Conflict of Interest as Ineffective Assistance of Counsel*

A criminal defendant's right to the effective assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, imposes on his or her counsel "a duty of loyalty, a duty to avoid conflicts of interest." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*); accord, *People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*) ["[t]his constitutional right includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client"].)

"'[A] defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant.' [Citation.] 'As a general proposition, such conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests."'" (*Doolin, supra,* 45 Cal.4th at p. 417.)

In *Doolin, supra,* 45 Cal.4th 390, the California Supreme Court explained that since *Strickland, supra,* 466 U.S. 668, the United States Supreme Court has analyzed Sixth Amendment conflict of interest claims simply as a category of ineffective assistance of counsel claims. (*Doolin,* at p. 421.) The *Doolin* Court focused in particular on *Mickens v. Taylor* (2002) 535 U.S. 162 [122 S.Ct. 1237, 152 L.Ed.2d 291] (*Mickens*) in which the United States Supreme Court held, under *Strickland, supra,* 466 U.S. at page 694, to establish a Sixth Amendment violation based on conflicts of interest a defendant must demonstrate both counsel's deficient performance and a reasonable probability that but for those deficiencies the result of the proceeding would have been more favorable. (*Doolin,* at p. 417; see *Mickens,* at p. 166; see generally *People v. Williams* (1997) 16

Cal.4th 153, 215 [discussing *Strickland* requirements]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218 [same].) As summarized by *Doolin*, under the United States Supreme Court's standard, "In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance*—as opposed to a mere theoretical division of loyalties.' [Citations.]" (*Doolin*, at pp. 417-418.) In any circumstance in which the defendant succeeds in demonstrating an actual conflict affected counsel's performance, the court must then address the prejudice prong of the *Strickland* standard. (See *Doolin*, at pp. 422, 428 ["*Strickland* provides the appropriate analytic framework for assessing prejudice arising from attorney conflicts of interest outside the context of multiple concurrent representation"].)

After reviewing its own "elusive and somewhat varied application" of the state Constitution's right to conflict-free representation in criminal trials during the past 40 years, the *Doolin* Court disapproved a line of cases holding attorney conflict claims under the California Constitution are to be analyzed under a standard different from that articulated by the United States Supreme Court. (*Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) "[E]mploying both [federal and state] standards is unnecessary and confusing. In the final analysis, both standards involve a consideration of prejudice in the outcome. . . . [W]e therefore harmonize California conflict of interest jurisprudence with that of the United States Supreme Court and adopt the standard set out in *Mickens*." (*Id.* at p. 421.)

In light of *Doolin*, *supra*, 45 Cal.4th 390—decided after the opening brief and petition for writ of habeas corpus were filed in this court but before the Attorney General's brief and Mabasa's reply—we must determine whether Mabasa has established Collins's retention of private counsel to represent him created an actual conflict that adversely affected his counsel's performance and, if it did, whether Mabasa has also demonstrated a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (See *Mickens*, *supra*, 535 U.S. at

p. 166; *Strickland, supra,* 466 U.S. at p. 694; see also *Doolin*, at p. 428 [no presumption of prejudice outside the context of multiple concurrent representation].)

2. *Mabasa Has Not Shown Markman's Purported Conflict Adversely Affected His Performance*

Rule 3-310(F) of the Rules of Professional Conduct prohibits a member of the California bar from accepting compensation for representing a client from one other than the client unless "[t]here is no interference with the member's independence of professional judgment or with the client-lawyer relationship" and "[t]he member obtains the client's informed written consent . . . ." (See generally *Wood v. Georgia* (1981) 450 U.S. 261 [101 S.Ct. 1097, 67 L.Ed.2d 220] [payment of legal fees by third party gives rise to potential conflict of interest].) The record on appeal plainly establishes Markman was retained to represent Mabasa by a third party, Collins. The appellate record also indicates Fahed attempted to interfere with Mabasa's defense by threatening to terminate his business relationship with Collins if Collins continued to pay Markman and Collins, in fact, stopped paying Markman prior to the beginning of trial. Whatever the conflict between Fahed and Collins, however, there is nothing before us suggesting Collins in any way sought to influence Markman's approach to defending the case or otherwise interfered with Markman's independent judgment in representing Mabasa.[3]

Even assuming an actual conflict as a result of Markman's retention by Collins, Mabasa has failed to demonstrate the conflict adversely affected Markman's performance, as required by *Doolin, supra*, 45 Cal.4th 390. To be sure, Mabasa asserts Markman was ineffective in failing to pursue potential defense witness and failing to adequately question witnesses at trial. As to the first point, Mabasa does not identify the

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[3] In his declaration filed with Mabasa's petition for writ of habeas corpus, Collins states Markman told him "his allegiance was to Mr. Mabasa." Although Collins indicates Markman asked him for help persuading Mabasa to accept a proposed plea agreement, the declaration does not suggest Collins ever attempted to influence Markman's representation of Mabasa. The exhibits to the petition do establish Markman failed to obtain an informed written consent from Mabasa, as required by rule 3-310(F)(3) of the Rules of Professional Conduct.

potential witnesses or explain how their testimony, even if admissible, would have helped the case. (See *Doolin, supra*, 45 Cal.4th at p. 424 ["[d]efendant's bare assertion fails to satisfy the deficient performance prong under *Strickland*"].) Moreover, in a closed hearing outside the presence of the prosecutor, described in more detail in the following portion of this opinion, Markman responded to Mabasa's criticism of his pretrial preparation and explained what he had done to date and what he intended to do to complete his preparation.

As to the second point, Mabasa's after-the-fact critique of Markman's questioning of the People's witnesses, including Fahed, fails to identify any flaws sufficiently egregious to permit us to conclude Markman's performance fell below an objective standard of reasonableness under prevailing professional norms. (See *People v. Williams, supra,* 16 Cal.4th at p. 215.) Indeed, there is a presumption these purported deficiencies in representation "'might be considered sound trial strategy'" under the circumstances. (*Strickland, supra,* 466 U.S. at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541; see *People v. Lucas* (1995) 12 Cal.4th 415, 442 [on direct appeal, conviction will only be reversed for ineffective assistance of counsel where the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission].)

Most tellingly, however, Mabasa fails entirely to explain how Markman's alleged ineffective representation was in any way attributable to his purported conflict of interest: Collins hired Markman to defend Mabasa and then stopped paying him. Nonetheless, Markman continued to represent Mabasa through trial. Nothing in the record supports even a suspicion any deficiencies in Markman's representation were prompted by the parties' fee arrangement. (See *Doolin, supra,* 45 Cal.4th at p. 416 [""[A]most any fee arrangement between attorney and client may give rise to a 'conflict.'""].) Without establishing that connection, Mabasa has failed to satisfy his burden under *Mickens, supra,* 535 U.S. 162 and *Doolin*. (See *Doolin,* at p. 423 ["Defendant has not established that counsel's failure to interview these witnesses was motivated by his asserted desire to keep for himself funds initially budgeted for this investigation. It does not follow

logically that the absence of an explanation discernable in the record for the absence of interviews can be attributed only to the financial conflict defendant urges. . . . Defendant therefore fails to show the asserted conflict adversely affected counsel's performance regarding this investigation."], 426-427 ["There is nothing in the record to support even a suspicion that these experts' conclusions were in any way influenced by the asserted conflict of interest. Nor is there any basis in this record from which we can speculate that any delay in retaining or preparing these experts was attributable to the asserted conflict."].)

3. *The Trial Court Did Not Abuse Its Discretion in Denying Mabasa's Midtrial Request To Discharge His Retained Counsel*

a. *Mabasa's belated request to discharge Markman*

At several points prior during pretrial proceedings (before Judge Marcus in Department 132) Mabasa and Markman indicated to the court their relationship was tenuous. Markman, however, plainly stated he intended to stay as Mabasa's lawyer unless another lawyer was retained or Mabasa elected to represent himself. Mabasa did not object to Markman's continued representation.

On July 30, 2007 in response to Markman's request for a two-week continuance of the trial date because of a serious medical condition, the court (Judge Van Sicklen in Department 100) asked Mabasa if he was willing to waive his right to go to trial in the next two days. Mabasa responded, "There is a chance he might not return. So that means I'll probably be waiving time just for the hell of it." The court inquired further, and Mabasa explained, "I'm trying to figure out if he's going to continue to represent me or not. If he's not going to represent me, I'm waiving time just for the hell of it is what I'm saying." The court then asked Markman if he intended to continue to represent Mabasa. Markman once again confirmed he would remain as counsel unless new counsel was retained. The court warned Mabasa, "If you are going to get another lawyer, do it between now and the date we select. Or if you are going to represent yourself, let us know now not the next time it's set for trial because the People are going to have witnesses ready to go and we'll have a court for you." After another confirmation by

Markman of his willingness to remain in the case, the court stated, "If you bring another attorney in, though, that attorney should be ready to go. You can't just wait until the last minute and substitute attorneys in, Mr. Mabasa." After again cautioning Mabasa—"Just to be clear, this is not a continuance for the purpose of new counsel coming in and, you know, the whole process starting again. . . . That's why I want Mr. Mabasa to know if we go over for two weeks and Mr. Markman has left the case, you should be ready to try it when you come back, with or without counsel"—the court selected August 13, 2007 as the continued trial date (as day eight of 10).

On August 14, 2007 the case was transferred to Department 120 (Judge Ohta) for trial.[4] The court and parties discussed possible resolution of the case, as well as issues of evidence and potential witnesses at trial, and then recessed to allow Markman to attend a doctor's appointment. The jury was selected and impaneled on August 15, 2007, and the court preinstructed the jury. There was no mention of discharging Markman or replacing him on either day.

When trial resumed on August 16, 2007, however, Mabasa stated he wanted to discharge Markman, "I would like to fire my attorney for ineffective counsel." The court advised Mabasa he could fire Markman if he wanted to because he had been privately retained, but added, "you have to understand something, that we're in the middle of trial. So you must be prepared to go forward pro. per. . . ."

Extended discussion ensued during the course of which Mabasa refused to execute a *Faretta* waiver in order to proceed through self-representation,[5] rejected the court's

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[4] On August 13, 2007 the matter was initially transferred from Department 100 to Department 133 for trial. It was retransferred to Department 100 apparently because Judge Lavin in Department 133 could not try the case within the statutory time. On August 14, 2007, after Mabasa exercised his right to disqualify Judge Champagne pursuant to Code of Civil Procedure section 170.6, the case was transferred to Department 120 (Judge Ohta) for trial.

[5] See *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*). In *Faretta* the Supreme Court held a criminal defendant not only has the right

offer to have Markman appointed and paid at public expense pursuant to *Harris v. Superior Court, supra,* 19 Cal.3d 786, inappropriately commented in front of the jury that his lawyer was not providing effective representation and the court had declined to provide him with a public defender and repeatedly refused to answer the court's questions regarding his willingness to cooperate and to comply with the court's rules. Ultimately, after reviewing relevant case law regarding discharge of privately retained counsel, the court concluded it was appropriate to hear Mabasa's complaints about Markman's representation outside the presence of the prosecutor in order to properly exercise its discretion in ruling of the discharge request. The court expressly stated it was not holding a *Marsden* hearing.[6]

At the closed hearing Mabasa told the court he and Markman "seem to be at an impasse. We cannot reach an agreement on a number of things. He thinks I'm going to lose the case, and I think I'm—I have a good defense. He doesn't think that I have a good defense." Mabasa then complained about Markman's failure to file various pretrial motions or to adequately investigate Fahed's background and to explore use of witnesses that might support a defense claim the robbery of Fahed had been staged. Mabasa was also concerned that Markman recommended he accept a negotiated plea. Markman conceded his communication with Mabasa was no longer good but explained to the court why he had not filed motions or taken the various other steps Mabasa now identified as necessary for the defense."

After the prosecutor reentered the courtroom, the court denied the request to discharge Markman as untimely. The court emphasized the various points of disagreement and dissatisfaction discussed by Mabasa were apparent before the case had

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to the assistance of counsel, but also "has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." (*Id.* at p. 807.)

[6] *People v. Marsden* (1970) 2 Cal.3d 118 addresses the circumstances under which a criminal defendant has a right to have his or her appointed counsel replaced and the procedures to be used by the trial court in determining whether those circumstances exist.

been transferred to Department 120 for trial, yet no request to discharge had been made in Department 100 or on either of the first two days the case was in Department 120.[7] To the contrary, Mabasa had allowed Markman to actively represent him during discussions of possible resolution of the case through a plea, the hearing of and ruling on motions under Evidence Code section 402, voir dire and jury selection and preinstruction of the jury. Considering the disruption in the proceedings that would result from discharging Markman at this point and Mabasa's failure to raise the issue during the preceding two court days, the court concluded the motion was not timely.

b. *The court has discretion to deny an untimely request by a criminal defendant to discharge retained counsel*

A nonindigent criminal defendant who seeks in a timely manner to discharge his or her retained counsel has a right to do so. (See *People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*) ["[t]he right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state"]; *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428.) While a defendant may discharge appointed counsel only if that lawyer is rendering inadequate representation or there exists an irreconcilable conflict between counsel and client (see *People v. Marsden* (1970) 2 Cal.3d 118, 123), he or she may discharge retained counsel for any reason. (*Ortiz,* at p. 984.)

The right to discharge retained counsel, however, is not absolute. The trial court may deny a request to discharge retained counsel "if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice.'" (*Ortiz, supra,* 51 Cal.3d at p. 983.)

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[7] Mabasa complains Markman failed to advise the court (Judge Ohta) the issue of Markman's representation had been raised at several pretrial hearings. However, the transcript makes clear the court was concerned only that Mabasa had not previously sought to discharge Markman for his purported ineffective assistance or conflict of interest and had made no attempt to replace him with new counsel prior to the start of trial.

"[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the [S]ixth [A]mendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (*Id.* at pp. 983-984.)[8]

Because the right to discharge retained counsel is broader than the right to discharge appointed counsel, a *Marsden*-type hearing at which the court determines whether counsel is providing adequate representation or is impeded by irreconcilable differences with his or her client is "'[an] inappropriate vehicle in which to consider [the defendant's] complaints against his retained counsel.'" (*People v. Hernandez* (2006) 139 Cal.App.4th 101, 108, quoting *People v. Lara* (2001) 86 Cal.App.4th 139, 155.) Instead, under the applicable test for retained counsel, the court should "balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*Lara*, at p. 153; see *People v. Lau* (1986) 177 Cal.App.3d 473, 478-479.) In so doing, the court "must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.'" (*Ortiz, supra,* 51 Cal.3d at p. 984.)

c. *There was no abuse of discretion*

The trial court properly articulated the standard for the exercise of its discretion in considering Mabasa's request to discharge Markman, actually placing on the record the language from *Ortiz, supra*, 51 Cal.3d 975 quoted in the preceding section. Although the

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[8] In *Ortiz, supra,* 51 Cal.3d 975 the Supreme Court held the trial court had erred by requiring the defendant to demonstrate the incompetence of his retained attorneys before allowing him to discharge them following declaration of a mistrial in his favor. As the Court observed, "Defendant's motion, made after the mistrial and well before any second trial, was sufficiently timely; the timing reflects defendant's genuine concern about the adequacy of his defense rather than any intent to delay the retrial. On this showing, discharge of the [lawyers] would not have interfered with the 'orderly processes of justice.'" (*Id*. at p. 987.)

issue of Markman's continued representation of Mabasa had been discussed for many weeks prior to the time the jury was impaneled and jeopardy attached, no request to discharge was made until the third day of trial. The jury was present; the prosecutor was about to present her opening statement; and witnesses were ready to testify. Given its untimeliness, the trial court did not err in its consideration and denial of Mabasa's request.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.